



Office of the
Saskatchewan Information
and Privacy Commissioner

INVESTIGATION REPORT 161-2015

Dr. Douglas A. Donbrook – Chiropractic Associates Clinic

September 16, 2015

Summary:

The Commissioner received a complaint about Dr. Donbrook's collection and retention practices with respect to the personal health information of clients of massage therapists that rent space in his clinic. The Commissioner found that Dr. Donbrook did not have adequate safeguards such as information sharing agreements and record retention and destruction schedules pursuant to section 16 of *The Health Information Protection Act* (HIPA). He also recommended that Dr. Donbrook ensure he has received express informed consent from the clients of the massage therapists before collecting personal health information.

I BACKGROUND

[1] My office received a complaint about the collection and retention practices of Dr. Donbrook. He was collecting personal health information of clients of massage therapists and another chiropractor that worked within his clinic. On August 14, 2015, my office provided notification to Dr. Donbrook of our intention to undertake an investigation. Dr. Donbrook has indicated that he intends to take the necessary steps to improve his compliance with *The Health Information Protection Act* (HIPA).

II DISCUSSION OF THE ISSUES

1. Does HIPA apply?

[2] HIPA applies when three elements are present. The first element is personal health information, the second element is a trustee, and the third element is if the personal health information is in the custody or control of the trustee.

[3] Dr. Donbrook is the sole owner of Chiropractic Associates Clinic. Dr. Donbrook qualifies as a trustee pursuant to subsection 2(t)(xii)(A) of HIPA because he is licenced under *The Chiropractic Act, 1994*.

[4] Dr. Donbrook indicated that he collects registration information about the clients of the massage therapists. He also collects both the registration information and other personal health information about diagnosis, treatment and care of both his clients and of the other chiropractor in his clinic.

[5] This data qualifies as personal health information pursuant to subsections 2(m) and (q) of HIPA. Dr. Donbrook has indicated that this personal health information is under his custody or control.

[6] HIPA applies in these circumstances.

2. Does Dr. Donbrook have authority to collect this personal health information?

[7] Section 24 of HIPA states:

24(1) A trustee shall ensure that the primary purpose for collecting personal health information is for the purposes of a program, activity or service of the trustee that can reasonably be expected to benefit the subject individual.

(2) A trustee may collect personal health information for a secondary purpose if the secondary purpose is consistent with any of the purposes for which personal health information may be disclosed pursuant to section 27, 28 or 29.

(3) Nothing in this Act prohibits the collection of personal health information where that collection is authorized by another Act or by a regulation made pursuant to another Act.

(4) A trustee may collect personal health information for any purpose with the consent of the subject individual.

[8] Section 24(1) contains three key elements:

- The collection must be for a service of the trustee.
- That service must be one that can reasonably be expected to benefit the patient.
- The service to the patient must be the primary purpose for the collection activity.

[9] Dr. Donbrook described the other chiropractor in his clinic as an “associate”. He collects the personal health information of his clients and the other chiropractor’s clients for the purposes of providing chiropractic services to the individuals. All three elements appear to be present so the collection is consistent with section 24(1) of HIPA.

[10] However, Dr. Donbrook has a different relationship with the massage therapists. It is a landlord and tenant relationship. He provided a blank copy of the agreement between himself and the massage therapists.

[11] Dr. Donbrook does not have the authority to collect the registration information of the clients of the massage therapists under subsection 24(1) of HIPA because the collection is not for a service of the trustee, it is for the service of his tenant.

[12] Dr. Donbrook indicated in his submission that: “[The clinic] has been using an electronic appointment scheduling system called Navicert for about ten years... The information collected was a requirement of the Navicert software program in order to schedule appointments and for accounting purposes.”

[13] Neither subsection 24(2) or 24(3) apply in this situation.

[14] However, it does appear that Dr. Donbrook is acting as an information service provider (IMSP) for the massage therapists. IMSP is defined in subsection 2(j) of HIPA as follows:

(j) **“information management service provider”** means a person who or body that processes, stores, archives or destroys records of a trustee containing personal health information or that provides information management or information technology

services to a trustee with respect to records of the trustee containing personal health information, and includes a trustee that carries out any of those activities on behalf of another trustee, but does not include a trustee that carries out any of those activities on its own behalf;

[15] Section 18(5) of HIPA allows a trustee to serve as an IMSP for another trustee. However, massage therapists do not currently qualify as trustees. HIPA does not consider a situation where a trustee acts as an IMSP for a non-trustee. The personal health information in this situation would be best protected if massage therapists did qualify as trustees and the IMSP relationship applied. The Minister of Health should consider bringing massage therapists under HIPA by prescribing them as trustees under the Regulations.

[16] Finally, we look to subsection 24(4) of HIPA which gives a trustee authority to collect personal health information if he/she gains consent from the subject individual at the time of collection.

[17] Consent is described in section 6 of HIPA:

6(1) Where consent is required by this Act for the collection, use or disclosure of personal health information, the consent:

(a) must relate to the purpose for which the information is required;

(b) must be informed;

(c) must be given voluntarily; and

(d) must not be obtained through misrepresentation, fraud or coercion.

(2) A consent to the collection, use or disclosure of personal health information is informed if the individual who gives the consent is provided with the information that a reasonable person in the same circumstances would require in order to make a decision about the collection, use or disclosure of personal health information.

(3) A consent may be given that is effective for a limited period.

(4) Consent may be express or implied unless otherwise provided.

(5) An express consent need not be in writing.

[18] In discussions with Dr. Donbrook, he indicated that he received implied consent from the massage therapists' clients because they willing give him their personal health information. However, as noted in subsection 6(1)(b), consent must be informed. In other words, the client must know the relationship between the massage therapist and Dr. Donbrook and whether Dr. Donbrook has the ability to use the personal health information for his own purposes. Dr. Donbrook indicated that he did not have anything

in place to inform the clients what would occur with the personal health information. This might include the receptionist explaining the relationship at the time of collection or a poster in the reception area. Therefore, Dr. Donbrook did not have authority to collect the personal health information of the clients of the massage therapists.

[19] In the future, Dr. Donbrook should receive express consent from the clients of massage therapists before he collects their personal health information. Express consent can be verbal pursuant to subsection 6(5) of HIPA, but should be documented.

3. Did Dr. Donbrook have appropriate safeguards in place?

[20] Section 16 of HIPA states:

16 Subject to the regulations, a trustee that has custody or control of personal health information must establish policies and procedures to maintain administrative, technical and physical safeguards that will:

- (a) protect the integrity, accuracy and confidentiality of the information;
- (b) protect against any reasonably anticipated:
 - (i) threat or hazard to the security or integrity of the information;
 - (ii) loss of the information; or
 - (iii) unauthorized access to or use, disclosure or modification of the information; and
- (c) otherwise ensure compliance with this Act by its employees.

[21] In situations where there is an IMSP or multiple practitioners operating under one trustee, one essential administrative safeguard is the information sharing agreement. An information sharing agreement is a written record of understanding between trustees and IMSPs, practitioners and other trustees that outlines the terms and conditions under which personal health information is shared. It also can affirm who has custody and control over personal health information. An adequate information sharing agreement should be in place between the parties to protect personal health information involved and to ensure compliance with HIPA.

[22] Dr. Donbrook's submission indicated that the "Lease Agreement" between himself and the massage therapists covered the collection of personal health information. The "Lease Agreement" states: "The Tenant consents that the Clinic collect and retain patient

information including but not limited to: names, addresses, phone numbers, e-mail addresses, Provincial Health Numbers.” This is not detailed enough to qualify as an adequate information sharing agreement.

[23] A joint resource by the Office of the Information and Privacy Commissioner for British Columbia, the British Columbia Medical Association and the College of Physicians and Surgeons of British Columbia entitled *Managing Contracts and Information Sharing Agreements (ISAs)* suggests that an information sharing agreement should do the following:

1. Define what personal health information means.
2. Describe the purpose for data sharing.
3. Reference all applicable legislation that provides the legal authority for collection, use, and disclosure of personal information.
4. Establish an understanding of who has custody and control.
5. Identify the type of information that each party will share with each other.
6. Identify the uses for the information and limitations on the uses to the specified purpose.
7. Describe who will have access and under what conditions.
8. Describe how the information will be exchanged.
9. Describe the process for ensuring accuracy.
10. Describe the process for managing privacy breaches, complaints, and incidents.
11. Identify retention periods.
12. Identify secure destruction methods when retention expires.
13. Describe the security safeguards in place to protect information.
14. Describe termination of the agreement procedures.

[24] It is my view that an adequate information sharing agreement between trustees and other parties require these elements.

[25] Further, the complaint received by my office was also about the retention and destruction of personal health information.

[26] Subsection 17(1) of HIPA has not yet been proclaimed. However, it will require trustees to have written policies concerning the retention and destruction of personal health information. My view is that retention and destruction schedules are an important administrative safeguard even though 17(1) had not been proclaimed.

[27] Dr. Donbrook's submission stated: "There are no specific written agreements to address these actions within the contract between the tenant and [the clinic]." He has not provided a retention and destruction schedule.

[28] Dr. Donbrook did not have adequate safeguards in place in these circumstances.

[29] We have been told that other chiropractic clinics in this province do not follow the best practices described in this report. I will be forwarding this report to the Chiropractors' Association of Saskatchewan and recommending that it advise its members to put adequate information sharing agreements and record retention and destruction schedules in place.

III FINDINGS

[30] Dr. Donbrook did not have the authority to collect the registration information of the clients of massage therapists because he did not obtain the informed consent of the clients.

[31] Dr. Donbrook did not have adequate safeguards in place to protect the personal health information of the clients of the massage therapists.

IV RECOMMENDATIONS

[32] I recommend that Dr. Donbrook ensure that he have the express informed consent of all current and future clients of massage therapists whose personal health information he has collected.

[33] I recommend that Dr. Donbrook enter into adequate information sharing agreements with associate chiropractors and massage therapists that work in his clinic.

[34] I recommend that Dr. Donbrook create a record retention and destruction schedule for all personal health information under his custody or control.

[35] I recommend that the Minister of Health amend the HIPA regulations so that massage therapists would qualify as trustees.

[36] I recommend that the Chiropractors' Association of Saskatchewan advise its members to ensure they have adequate information sharing agreements and record retention and disposition schedules in place.

Dated at Regina, in the Province of Saskatchewan, this 16th day of September, 2015.

Ronald J. Kruzeniski, Q.C.
Saskatchewan Information and Privacy
Commissioner